

THE FIRST JUDGE AT DETROIT AND HIS COURT

AN ADDRESS

BY

THE HONORABLE WILLIAM RENWICK RIDDELL

L. H. D., ETC.

OF TORONTO (JUSTICE OF THE KING'S BENCH, DIV'N, H. C. J., ONT.)

FOR THE

TWENTY-FIFTH ANNUAL MEETING

OF THE

MICHIGAN STATE BAR ASSOCIATION

LANSING, MICHIGAN, JUNE 10, 11

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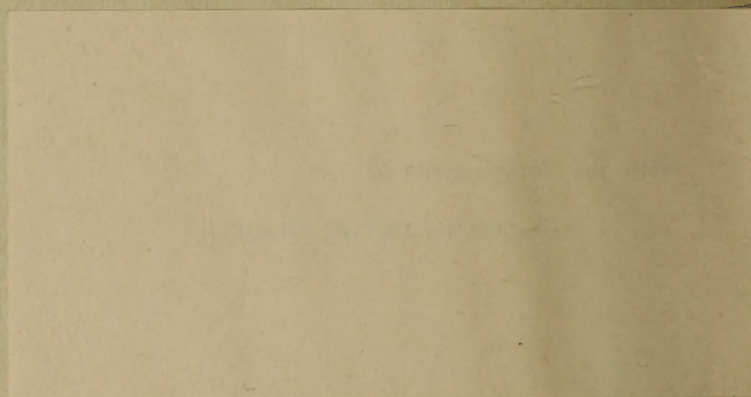
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WILLIAM RENWICK RIDDELL.

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THE "FIRST JUDGE" AT DETROIT AND HIS COURT.

BY THE HONOURABLE WILLIAM RENWICK RIDDELL, LL. D., F. R. HIST.
SOC., &c., JUSTICE OF THE SUPREME COURT OF ONTARIO.

In March, 1789, William Dummer Powell, a lawyer practising in Montreal, was appointed "First Judge" of the Court of Common Pleas for the District of Hesse: and shortly thereafter came to Detroit. It is of him and his Court that I would speak—but first a word or two of the times prior to his appointment.

When in 1759-60, Canada passed from under the French Crown, her extent toward the West was ill-defined but of course the French territory included Detroit. The Articles of Capitulation, Sept. 8, 1760, between General Amherst, Commander-in-Chief of the British forces, and Marquis de Vaudreuil, Governor of Canada, provided by Article III that the French troops "who are in Our posts situated on Our frontiers . . . at Detroit, Michilimaquinac and other posts" should have the honours of war but were not to serve during the war—such of them as remained in Canada were not to be carried into other British territory, Article XXXIX. By the Treaty of Paris, February 10th, 1763, Article IV, the King of France "cedes and guarantees to His . . . Britannick Majesty, in full right Canada, with all its dependencies . . .", and His Britannick Majesty agreed to allow French inhabitants and other French subjects to withdraw in safety and freedom wherever they might think proper, but within eighteen months of the ratification of the Treaty.

By this Treaty, Detroit and its surrounding Country passed definitively under the British Crown.

Detroit had been known for about a century—in 1686 a fort had been built at Fort Gratiot but it had been abandoned. Then in 1701 Cadillac with a priest and some hundred men established a fort on what is now Jefferson Avenue, Detroit. His men occupied the adjoining country; and the settlement increased. At the time of the Conquest in 1760, Major Rogers (the original of Fenimore Cooper's Leather Stocking) who had been commissioned to take over the conquered territory to the West, found the population of Detroit and its neighborhood to be about 1,000, the settlement running along the river several miles.

The Royal Proclamation of October 3rd, 1763, divided the territory

which had been ceded by the Treaty of Paris into "four distinct and separate governments"—the Detroit territory came within the Government of Quebec (although it is impossible to make out precisely the boundaries intended—probably the authors of the Proclamation did not know themselves.)

For a time Detroit seems to have had a kind of semi-detached existence; but May 1st, 1775, it was definitely and formally annexed to the Province of Quebec with a Commandant fully under the control of the Quebec authorities.

Coming into British hands, a fairly large immigration took place which was a little added to by the rebellion of the Colonies against the Motherland. Indians acknowledged the right of the King of England to the land on either side of the river, and some settlements made their appearance on the east side.

During all the troublous times of the Revolution, Detroit was full of British soldiers and loyal civilians. In 1783, it was expected by the authorities at Quebec that many settlers would make their way to this district from Virginia and Maryland "in order to free themselves from burdensome taxes:" care was taken "not to receive any whose political characters will not bear the nicest scrutiny . . . none shall be permitted to settle in this Province but those of approved loyalty." All must take the oath of allegiance and subscribe a Declaration promising to maintain and defend to the utmost of their power the authority of the King and Parliament as the supreme Legislature of this Province.

Jehu Hay was commissioned Lieutenant-Governor at Detroit in that year and directed (after a short delay) to repair thither at once: he did not arrive until July 12th of the following year, 1784. He had been instructed to inform himself of the number of Loyalists at and near Detroit: at first he could find only one man of that description (July 16th, 1784): by August 5th he had discovered twelve, and by September 2nd, twenty-five, whose names he sends on to Governor Haldimand (amongst them Simon Girty, the well-known "Renegade"). He gives the names of twenty-six others wishing to settle at Detroit with their families, one with twenty in his family, two with ten, two with eight, the number in other families not given—these were living near Fort Pitt (Pittsburgh) and had not taken up arms against the Crown; they wished to settle under the British flag, provided lands were granted them.

The Definitive Treaty of Peace, concluded September 3rd, 1783, had been ratified by Congress, January 14th, 1784, and proclaimed the same day. This by Article II made a boundary between the United States and British territory the middle line of the Great Lakes and the connecting rivers: and consequently Detroit was within the American territory. But the same Treaty by Article IV had provided that "creditors on either side shall meet no lawful impediment to the recovery of the full value in sterling money of all bona fide debts hereto-

fore contracted." Certain of the States had passed legislation which prevented British creditors enforcing by process of law their claims against American debtors in these States. They refused to repeal the obnoxious legislation, the general Government could not compel them to do so and this section of the Treaty was a dead letter. Thereupon Britain determined to keep possession of the Forts on the right side of international rivers, including that at Detroit, until redress should be granted to British subjects. Detroit was held as British territory notwithstanding many protests from the American Government,—the Americans did not abandon the claim, but more than once approached the Indians with the claim to sovereignty.

Settlers came in from Ohio and elsewhere till in 1788 there were about four thousand in Detroit and vicinity and "increasing fast",—"along the bank of the River, a computed distance of four miles below the Fort and twelve above it, and about the same distance on the opposite bank." The Indians on the left shore vacillated in their position regarding settlement there—sometimes protesting against it and sometimes expressing their approval. It may be that the quantity and kind of the gifts made to them had something to do with their policy. The whole country on either side of the waters was not infrequently referred to as "Detroit," sometimes, indeed, as "Detroit and its dependencies."

The "Merchants" of Detroit with one exception (Duperon Baby, whom we shall meet again) were English and Scotch: Baby was Canadian, i. e., French-Canadian. In addition to these merchants, there were many Indian Traders, mostly Canadians. These took goods from the merchants, i. e., the importers, carried them into the Indian territory and traded them for furs. It need not be said that no small or unimportant part of these goods consisted of "wet-goods," rum, brandy and the like. The employees of these Traders were also Canadians as a rule. The rest of the population in the Post and the farming community were mixed, Canadians predominating.

Detroit was a great distributing point, sending about £60,000 worth of British manufacture yearly into the Indian territory and consuming about £20,000 in the settlement itself; while great quantities of fur and peltries were sent to Montreal agents to be by them shipped to London for sale on account of the Detroit merchants.

So long as the French Regime lasted, the Commandant of the Fort was the judge in all disputes and had almost unlimited power and jurisdiction. Much the same state of affairs continued when British forces took the place of French: English law was supposed to govern but there is little doubt that "the length of the Chancellor's foot was a foot." By the Proclamation of 1763, Detroit became formally part of the Province of Quebec; and by the same Instrument the English Law, Civil and Criminal, was made the law of the Province.

In the Royal Commission, November 21st, 1763, to James Murray as Captain General and Governor-in-Chief of the Province of Quebec, he

was given power, with the advice and consent of the Council, "to Erect, Constitute and Establish such and so many Courts of Judicature and Publick Justice within Our said Province" as should be necessary—the Commission further gave him power to "constitute and appoint Judges and in cases requisite Commissioners of Oyer and Terminer, Justices of the Peace, Sheriffs and other necessary officers and ministers in our said Province." His Instructions, December 7th, directed him to apply his Attention to these great and important objects (Sec. 16).

In the following year, September, 1764, Governor Murray issued an Ordinance establishing a Court of King's Bench for the Province to sit at Quebec—in this sat the Chief Justice with power to hear and determine all cases, Civil and Criminal,—an Appeal lying from his decision to the Governor and Council in cases over £300 Sterling: a further Appeal being provided for from the Governor and Council to the King and Council where the Matter in contest was of the value of £500 Sterling or upward. The Chief Justice was also to hold a Court of Assize and General Gaol Delivery once a year at Montreal and Three Rivers. It had been intended that the Court at Montreal should sit twice a year, but this was found too expensive.

A Court of Common Pleas was also established with jurisdiction in cases above £10 with an appeal to the Court of King's Bench in cases of £20 or upwards. This also sat at Quebec at the same time as the King's Bench and was intended "only for Canadians." Either party might demand a jury (in the King's Bench the trial was by jury): when the amount in contest was over £300 Sterling an Appeal lay to the Governor-in-Council and a further Appeal to the King in Council where the amount was £500 Sterling or upward. In both Courts the Law of England was to be applied except in cases between natives of the Province where the cause of action arose before October 1st, 1764, in which cases the French law and customs were to prevail.

Justices of the Peace were to determine cases of less importance, one Justice up to £5 and two up to £10 "current money of Quebec" (£1 Quebec Currency is \$4) without appeal: three Justices or more in Quarter Sessions could hear and determine causes above £10 and not more than £30 subject to an appeal to the King's Bench. The Courts of Quarter Sessions were to sit every three months at Quebec and Montreal only, until there should be a competent number of persons qualified to be Justices of the Peace at or near Three Rivers: and the Province was divided into two Districts for that purpose by the Rivers Godfroy and St. Maurice. By this Ordinance, of course, Detroit came within the jurisdiction of the Quarter Sessions at Montreal and the Justices of the Peace of that District—no very great advantage, as we shall see later.

Neither the law nor its administration was wholly acceptable to the Canadians. In 1770, February 1st, Sir Guy Carleton, the

Governor-in-Chief issued another Ordinance taking away the Civil jurisdiction of the Justices of the Peace and directing all disputes for any sum not exceeding £12 Currency (\$48) to be tried by the Judges of the Courts of Common Pleas. The Court of Common Pleas formerly sitting at Montreal and considered part of the Court of Common Pleas at Quebec was made independent with Judges residing constantly at Montreal. The two Courts at Quebec and Montreal were limited in their jurisdiction to their own Districts and were to be constantly open except on Sundays and certain vacations. One day in each week was to be set aside for these cases not exceeding £12, and one Judge might determine them: every Friday to be a Court day for such cases.

Agitation for and against the reinstitution of Canadian law continued and at length in 1774 was passed The Quebec Act, 14 George III, C. 83. This by section 3 revoked and annulled as of May 1st, 1775, all Ordinances of the Governor and Commissions to Judges, &c., theretofore made: Section 8 provided that "in all matters of controversy relating to property and civil rights resort" should "be had to the Laws of Canada," i. e., the former French Canadian law: while Section II retained the English Criminal Law. By Section 17 the Crown retained the right to erect Courts of Criminal, Civil and Ecclesiastical Jurisdiction and to appoint judges and officers. This Act aroused the bitterest opposition from the English subjects and petitions were sent to Westminster for its repeal but in vain.

Governor Carleton received with his new Commission, Instructions dated January 5th, 1775, which directed him, Sec. 15 (in general) to establish a Provincial Court, the Court of King's Bench, for cognizance of all Pleas of the Crown (i. e., Criminal cases) in the Province—also to divide the Province into two Districts, those of Quebec and Montreal and establish in each a Court of Common Pleas with jurisdiction over all civil causes "cognizable by the Court of Common Pleas in Westminster Hall." He was instructed also that there should be an "Inferior Court of Criminal and Civil Jurisdiction in each of the Districts of the Illinois, St. Vincenne, Detroit, Missilimakinac and Gaspée by the name of the Court of King's Bench for such District"—the Judges of these inferior Courts to have the same jurisdiction in Civil matters as any other Judge of a Court of Common Pleas and in Criminal matters the same as the Chief Justice of the Province except that in Treason, Murder and other Capital Felonies they should only arrest and commit to the gaols of Quebec or Montreal to be tried before the Chief Justice: Appeals in matters over £10 to be taken to the Governor-in-Council with a further appeal to the King in Council in cases of £500 and upwards. The importance attached to these inferior Courts is manifested by another reference to them in Section 31, and Section 56 provides a salary of £100 for "one Judge of the Inferior Courts of King's Bench and Common Pleas at each of the . . . five Posts" with £50 of a salary to an Assistant or Assessor.

The Courts of Common Pleas at Quebec and Montreal were each

to have three Judges, "two of our natural-born subjects of Great Britain, Ireland or our other Plantations and one Canadian." The inferior Courts were to have only one "a natural-born subject of Great Britain, Ireland or our other Plantations and . . . one other Person being a Canadian by the name of Assistant or Assessor to give advice to the Judge in any matter where it may be necessary."

The invasion of the Province by the American Rebels rendered it necessary to place the legal system on a provisional basis for the time being—three Judges were, April 10th, 1775, appointed for Quebec and three for Montreal under the name Conservators of the Peace, but nothing was done for Detroit or the other four Districts.

The invaders having been driven from the Province, Carleton proceeded to pass an Ordinance in regular form, February 27th, 1777. This divided the Province into two Districts, Quebec and Montreal, as before, established a Court of Common Pleas for each to sit at the two cities respectively at least one day each week for causes over £10 Sterling and another for those of or under £10. Above £10, two Judges were necessary and an appeal lay to the Governor and Council with a further appeal to the King in Council where involving £500 Sterling or over. Up to £10, one Judge was sufficient and there was no appeal (unless there was a question of duty payable to the King, fee of office or annual rents &c., in which case no matter what the immediate value an appeal lay to the Governor in Council and to the King in Council). By an Ordinance of March 4th, 1777, a Court of King's Bench was established for the Province with Criminal jurisdiction to hold two sessions in Quebec and two in Montreal each year: also a Court of Quarter Sessions was established for each of the two Districts to sit four times a year. Nothing was done toward carrying out the erection of inferior Courts in the five out-lying districts: and Detroit remained in the District of Montreal.

The American Revolution having succeeded and the Definitive Treaty of Peace having been signed at Paris, September 3rd, 1783, and ratified early the following year, it was confidently expected that Detroit would be given up to the Americans. We have seen how and why that expectation was not satisfied.

Turning now to the state of affairs at Detroit—from the surrender of Detroit by the French for a few years the occupation by the British was by force of arms and conquest; but the Treaty of 1763 made legal what had previously been by force.

During this period of two or three years, there does not seem to have been anything in the way of civil courts, the British commanders following the example of their French predecessors.

They took it upon themselves after the formal cession to commission Justices of the Peace—it is said that Gabriel Le Grand acted under some commission of the kind as early as 1763.

In the "Pontiac Manuscript" under date May 20th, 1763, mention is made of "Mr. Le Grand who has been substituted as judge in the

place of Mr. St. Cosme," and he seems to have been acting as judge in 1765.

Two years later Philip Dejean received a similar commission. In the same year, 1767, the Commandant Major Bayard gave Dejean another commission as "Second Judge" to hold a "Temperary Court of Justice to be held twice in every month at Detroit, to Decide on all actions of Debt, Bond, Bills, Contracts, and Trespasses above the value of £5 New York Currency." (In the New York Currency, a shilling was 12½ cents—a York shilling or "Yorker" still in vogue on the north shore of Lake Ontario in my boyhood, fifty years ago. £1=20s=\$2.50, £5=\$12.50.)

When Henry Hamilton was sent as Lieutenant Governor in 1775, he allowed Dejean to continue in his Court as Justice of the Peace, and Dejean went far beyond the limits of the authority of a Justice of the Peace. We are told that a man and woman were tried in 1776 by Dejean with a jury, six English and six French, on a charge of arson and larceny, but the jury "doubted of the arson." The man was executed, it is said by the hands of the woman who thus bought her freedom. The attention of the authorities at Quebec was drawn to the state of matters in Detroit, by the extraordinary proceedings, and warrants were issued for Governor and Justice. The Grand Jury at the Court of King's Bench at Montreal on Monday, September 7th, 1778, presented Dejean for "divers unjust & illegal Terranical & felonious Acts" during 1775, 1776 and 1777 at Detroit; and Henry Hamilton the Governor for that he "tolerated, suffered and permitted the same under his Governmant, guidance and direction"—hence the warrant.

The stirring times following the American invasion of Quebec were on, and the offenders escaped immediate punishment.

By letter of April 16th, 1779, Lord George Germain, Secretary of State for the Colonies (afterwards Viscount Sackville) wrote "The presentments of the Grand Jury at Montreal against Lieut.-Gov. Hamilton and Mr. Dejean are expressive of a greater degree of jealousy than the transaction complained of in the then circumstances of the Province appeared to warrant. Such stretches of authority are, however, only to be excused by unavoidable necessity and the justness and fitness of the occasion." He therefore ordered that the Chief Justice should examine the evidence of "the Criminal's Guilt, and if he be of opinion that he merited the Punishment . . . tho' irregularly inflicted . . . a 'nolle prosequi' should be entered. This was done.

It is not unlikely that it was Hamilton, rendered cautious by this experience, who recommended the Merchants to form the Board of Arbitrators to be mentioned later.

Thereafter I cannot find any trace of either civil or criminal law being administered in Detroit until the year 1789.

As to Civil cases, a vivid account of the unsatisfactory state of affairs is given in a Report of the merchants of Montreal. "The merchant of Detroit sends to Montreal for a summons against one of his

Debtors . . . His letter takes a month frequently coming down, the Summons issues and three months is the shortest space allowed for its return and according to the season four, five and six months is granted. The Summons goes up . . . some ignorant Person is appointed to serve it, he commits an error; so that when the writ is returned, the Service is found defective, and the only remedy then left to the plaintiff is to begin again—this happens at least three times out of five, but if perchance the Summons is returned properly served and that Judgment goes by Default, it then requires six months before the property of the Debtor can be seized upon at Detroit by virtue of an execution issuing on a Judgment so obtained, and even when Execution goes up it's of no avail unless the Commanding Officer of the Post interferes by affording Military aid to enforce it." The Report states that there are not less than forty suits a year above £10 Sterling by persons in Detroit against others in the same place and not above one-fourth have the desired effect, not to mention the very great expense for costs of suit—if a resident Judge were to be appointed there would be three or four hundred suits as well below or above £10 Sterling. The Report recommended the formation of a District separate from that of Montreal and composed of the Posts of Detroit and Michilimackinac, the establishing of a Court of Civil Jurisdiction therein to be called the Court of Common Pleas with similar jurisdiction to that of the other Courts of Common Pleas in the Province and presided over by one Judge whose judgment should be final upon to £50 Currency (\$200) with an appeal to the Court of Montreal when over that sum. The Governor did not follow this advice.

In this state of affairs it is no wonder that the Detroit Merchants formed themselves into an Association, each member of which signed a general Arbitration Bond binding himself to abide by the decision of Arbitrators in any dispute between them. Of course, no one could be compelled to implement his agreement; still, in most cases, the consequences of refusing to do so were so serious that the awards were obeyed "for those who would not obey could not recover debts and the commanding officer refused to grant them passes to go for their canoes to the Indian Country . . . People who lived in Detroit were compelled to submit or live there as outlawed." But as this was only "a local temporary expedient dictated by extreme necessity . . . possessing no coercive authority to carry its judgments into execution it could not answer the end of a Court of Judicature, although it "was better than none."

The needs of the inhabitants of Detroit were not overlooked: we find in the new Instructions to Sir Guy Carleton, now become Lord Dorchester, August 23rd, 1786, while there is no direction to establish an Inferior Court at the five Posts, there is a provision for the payment of one Judge (£100) and one Assistant or Assessor (£50) at each "of the above posts"—Detroit alone being specifically mentioned.

At length Dorchester by Patent dated July 24th, 1788, formed the

territory which was afterwards to be Upper Canada and including the Detroit region, into four Districts, Luneburg, Mecklenburg, Nassau and Hesse, the last named being the most westerly, stretching from Long Point on Lake Erie and comprehending "all the residue of our said Province in the Western or inland parts thereof, of the entire breadth thereof from the Southerly to the Northerly boundaries of the same." He says in a letter to Sydney, November 8th, 1788, "the three districts of Luneburg, Mecklenburg and Nassau are inhabited only by the loyalists or old subjects of the Crown": in the same letter he says, "Some (of the Canadians or new subjects) are also found in the Districts of Gaspé and Hesse."

A Court of Common Pleas was established in each District: and July 24th, 1788, Messrs. Duperon Baby, Alexander McKee and William Robertson were appointed Justices of the Court of Common Pleas for the District of Hesse—all Detroit men, the first a "Canadian." Thomas Smith was the same day appointed Clerk of the Court as well as Clerk of the Peace and of the Sessions of the Peace. Eight gentlemen were appointed Justices of the Peace, four "Canadians" and four "old subjects."

The appointments to the Bench of the Civil Court were not received with approval by the citizens of Detroit. Baby and Robertson were merchants (the former the only French-Canadian merchant in that settlement). They were "extensively interested in trade, and discussions respecting property connected with it must, nine times out of ten, affect them either immediately or circuitously." Moreover, those interested wanted a Judge and the "professions of Judge and Merchant combined in the same person are wholly incompatible." "Much of the commercial prosperity of the nation is at stake in this District perhaps as much as in all others combined and from the hazardous nature of the trade, a proper judicial establishment is essentially requisite to give any security to it. But that security can only be obtained by the appointment of at least one person of professional abilities and character with a salary depending neither on perquisites nor the voluntary contributions of Individuals." A petition from which I have been quoting was signed by some thirty-four inhabitants of Detroit—all "old subjects." M. Baby having been named one of the Judges did not think it proper for him to sign, and "the rest of the (French) Inhabitants are not concerned in trade, being for the greatest part planters who consider themselves but very little concerned in law." Robertson, who as well as Baby, refused the appointment, signed the Petition (which probably was written by him) and sent a letter to the Honourable William Smith, Chief Justice of the Province, setting out the objections to the Court and recommending the appointment of one Judge learned in the law. He and Baby brought the Petition to Quebec and urged it upon the Governor. He gave evidence, October 24th, 1788, before a Committee of the Council to whom the matter was referred: and that body was convinced of the justice of the petition.

In the following month, November 14th, the Committee reported advising the appointment of "Gentlemen of Law Abilities and possessing knowledge in the custom of Merchants" and payment by Salary on "such certain and permanent provision for their support as the dignity and importance of their stations require."

However, it was decided to appoint but one Judge for the time being; and as we have seen, William Dummer Powell was fixed upon by the Governor as "First Judge."

By an Ordinance May 7th, 1789, Section 3, it was enacted by Governor and Council "that until the Bench of the Court of Common Pleas for the District of Hesse shall have three Judges duly appointed therein, all the Powers and Authorities of the whole number shall be vested in such person as shall have a Commission to be First Judge thereof." Section 9 further provided that in Civil actions instituted in Hesse the jurisdiction of the Court should not be ousted on the ground that the cause of action arose without the District, or that the Domicil of the Defendant was out of the District, but that all proceedings should be as effective "as if the Cause of Action and Ground of Defence had arisen and all Transactions relating to the same had happened within the said District of Hesse." This showed the very great confidence reposed and rightly reposed in William Dummer Powell.

Let us now see who this William Dummer Powell was.

The "First Judge" Himself.¹

Early in the eighteenth century, William Dummer, Lieutenant Governor of Massachusetts—he of "Dummer's War" fame—brought with him from England as secretary, a gay young man of Welsh descent, John Powell by name. Dummer came of Roundhead stock, his father, the younger son of a good Hampshire family, having on the Restoration in 1660 emigrated to Massachusetts from London, where he had carried on business as a silversmith. Powell's family were Cavaliers: "Church and State" their cardinal principle. He was handsome, light-hearted, and with habits such as we associate with a courtier of Charles the Second—"too dissipated to secure him happiness."²

Dummer had a sister Anne, "a little woman of very dignified presence and manner and sober conversation," "a proud Presbyterian who had disdained many offers." Powell made a bet one day in his club that he would marry her, and did so—only, however, with the express agreement that all children after the first son should be brought up Independents; the first son to be Church of England.

The eldest son was called John; he was bred a High Churchman and Tory; the others were Republicans and Congregationalist or Pres-

¹Those who may be interested and desire further information concerning Powell are referred to "The Life of Chief Justice William Dummer Powell" by the writer, which is shortly to be published by The Carswell Company, Toronto.

²This and other quotations are from the manuscripts of the Chief Justice now in the possession of his great-grandson Aemilius Jarvis, Esquire, of Toronto. Nearly all the facts of this article are taken from the same or other contemporary manuscripts.

byterian. This John Powell became contractor for victualling the Royal Navy at Boston, and made considerable money. He married Janet Grant, of a well-known aristocratic Scottish family, whose father, Suetonius Grant, had renounced claims to a baronetcy and was living in the Colony of Rhode Island as a merchant. Their eldest son was born in Boston in 1755 and was christened William Dummer.

William Dummer Powell was not designed for any profession or business—it was believed that his father could and would provide for him and the rest of the family. He was educated at the Boston Free Grammar School, and afterwards at a well-known private school in Tunbridge, Kent; then he was, at the age of fourteen, sent to Holland to acquire the French and Dutch languages. Returning to England at the age of sixteen, he spent a year of unsettled life, during which he “cultivated the good graces of the ladies more than any other pursuit.” In 1772 he sailed for Boston, having been recalled to attend his father whose life was despaired of. In the summers of 1773 and 1774 he visited Canada and the “Middle Provinces,” applying himself to law in the winter, not to fit himself to practise law but to qualify himself for public life.

These were troublous times. In December, 1773, “the Boston Tea Party” threw the East India Company tea into the Harbour, and Boston was all aflame with rebellion. The consignees of this tea were intimate friends of the Powells; indeed, Anne Powell, sister of William Dummer Powell, afterwards married one of them—Isaac Winslow Clarke, son of Richard Clarke; father and son being in partnership as consignees and agents of the East India Company.

It is not without interest to note that a sister of Isaac Winslow Clarke married John Singleton Copley, the painter, and became the mother of the celebrated Lord Lyndhurst, Lord Chancellor of Great Britain.

John Powell’s family were loyal to the core, and William Dummer Powell joined the garrison at Boston as a volunteer, serving during the siege. But he fell in love with an English girl, Anne Murray (daughter of Dr. J. Murray of Norwich, England) who was then on a visit to her aunt, Mrs. Inman, at Boston. The young couple were married in 1775. The bride’s health became impaired, and her husband took her to England, accompanying General Gage when he gave place to Howe.

The father was obliged to leave Boston, and went also to England. He lost considerable money by the bankruptcy of his agents; and it became obvious that William Dummer Powell must make his own living. He accordingly entered the Middle Temple as a student at law, January 24th, 1776, and continued his studies for some three years; he was not, however, at that time “called.” William Grant, who had made a name for himself at the Bar in Canada, left the Province in 1779 for England, where he was to become Master of the Rolls. When

Powell heard of this, he thought that there would be a chance for him in the new country, particularly as he had some knowledge of it and had friends there. He provided himself with letters recommendatory from Lord Sackville and some officers of the army who had been hospitably entertained in his father's house in Boston; and he arrived in Quebec in August, 1779.

The Governor, Sir Frederick Haldimand, a soldier of fortune, honest but gruff, "had no use" for lawyers and (in substance) told Powell so. Accordingly, Powell made his way up to Montreal. He had been admitted to practise in Quebec on the strength of a letter of recommendation from the Royalist Governor Wentworth to Lieutenant Governor Cramahé; and in his new home he received some assistance from his friends, amongst them Richard Winslow Clarke, later to become his brother-in-law.

His most noted client was Pierre du Calvet, who had rather inclined toward treason on the occupation of Montreal by the American troops. Du Calvet thought he did not get fair play from the Montreal Courts, and published an atrocious libel against the judges. For this a criminal information was filed, and he was tried by a special jury. Owing in great measure to the skill of his counsel, he secured an acquittal.³ This triumph and Powell's sound knowledge of law soon got him into good practice, especially among the official class.

In 1780 his wife, who had been left behind in England with her three boys, came out to him. She was on the voyage captured by an American privateer and taken to Boston. There the friends of her husband's family and her own friends treated her handsomely and procured her the means of reaching her husband in Montreal.

At the Conquest in 1759-60 the English law, civil and criminal, had been to a great extent adopted by the Military Governors; and by the Proclamation of 1763 this law had been in terms imposed upon the conquered colony. By the Quebec Act of 1774 the English Criminal law was retained and the former French-Canadian civil law re-introduced. This gave much offence to the English and American Loyalist immigrants, and they organized a movement for the re-instatement of the English civil law. Into this movement Powell threw himself with much vigour: he soon became a leader, and was chosen one of the delegates to carry a petition to the King in that sense across the Atlantic. He crossed to England and remained there for the winter of 1783-84; but the Government were too busy with India and Ireland to pay much attention to his petition. He was called to the Bar of

³Du Calvet was imprisoned by Governor Haldimand for a long time on a very strong suspicion of treasonous dealing with the American Rebels. On the Peace in 1783 he was released. He proceeded to England, where he made an appeal to the Government and the public against his treatment in the Colony; he also instituted an action against Haldimand in the English Courts for £20,000 damages for false imprisonment. He came to this continent to obtain evidence for that action upon a Commission, and sailing from New York for London, March 15th, 1786 on an old Spanish prize then called the "Sherburne" he was lost at sea; neither ship nor passengers being ever heard of again—"a violent storm such as had never occurred in the memory of man." The perils of the sea were then very real.

the Middle Temple February 6th, 1784 and returned to this continent in the spring of 1784. The Treaty of Peace of 1783 having been signed, he sailed direct for Boston, where he remained for some time in the endeavour to get back for his family their property which had been taken from them.⁴ As he refused to renounce his allegiance, he failed in the attempt, notwithstanding Article V of the Treaty of Peace.⁵ He returned to Canada in 1785, and renewed the practice of law with very great success.

As we have seen, in 1788 a Court of Common Pleas was organized in each of the four districts into which Lord Dorchester divided the territory afterwards to be Upper Canada: Lunenburg, Mecklenburg, Nassau, and Hesse. We have seen that the Governor appointed three non-professional men as Judges of the Court in the District of Hesse; and that neither the appointees nor the people were satisfied with the constitution of the Bench, and petitioned for a Judge who was a trained lawyer. The high professional attainments of Powell marked him out for the position, and he was appointed in 1789; a special provision being made that he should have all the powers of three Judges.

The District of Hesse consisted of the southwestern part of what is now Ontario, and the British still kept possession of Detroit and the adjoining country.

Powell, with his wife and family including Anne Powell his sister, left Montreal May 11th, 1789 for Detroit, where they arrived June 9th; a trip of twenty-nine days. There is still extant a M.SS. written by Anne Powell giving a graphic account of the journey. They drove from Montreal to Lachine and then took to flatboats as far as Kingston, which they reached on the tenth day. Then a schooner took them to Fort Niagara (also in possession of the British). There they saw the celebrated Joseph Brant and the illfated Lord Edward Fitzgerald, and attended an Indian Council at which upwards of two hundred Indian Chiefs were present. They passed over to Lake Erie and took ship; their passage thence to Detroit lasted five days.

The Court House was at L'Assomption (Sandwich) on the east side of the river; but the Powells resided in Detroit. Most of the proceedings of the Court are still existing. The law administered was the French Canadian civil law, and the language French or English in-

⁴In this endeavor he received the wholehearted assistance of his republican uncles; they were well known and ardent revolutionaries, whose names will be found in accounts of contemporary Boston; e. g. see Frothingham's "Life of Joseph Warren," p. 244, note 1; Drake's "Tea Leaves", pp. L, 301; "Siege of Boston" *passim*. John Powell's name is in several Acts of Attainder of the Massachusetts Legislature.

⁵"V. It is agreed that the Congress shall earnestly recommend it to the Legislatures of the respective States to provide for the restitution of all estates, rights and properties which have been confiscated belonging to real British subjects . . . and that Congress shall also earnestly recommend to the several States a reconsideration of all acts and laws regarding the premises so as to make the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation which on the return of the blessings of peace, should universally prevail."

The manner in which certain of the States acted in connection with the Loyalists and their forfeited property forms one of the most discreditable chapters in history; instead of receiving conciliatory treatment, the Loyalists were misrepresented, slandered, vilified, as well as robbed under the forms of law.

differently. In addition to sitting in and as the Court of Common Pleas, Powell was frequently appointed on the commissions of Oyer and Terminer and General Gaol Delivery, when criminal cases came before him. I have before me the original record which shows that an unfortunate burglar received sentence of death from him. Criminal cases were tried with a Jury: civil cases apparently in the Court without.

When Canada was divided into two Provinces, Upper Canada and Lower Canada, by the Act of 31 George III c. 31 (1791), the Upper Province by its first legislation introduced the English civil law (1792).

Powell continued to preside in his Court of Common Pleas till 1794 when on the organization of the Court of King's Bench for Upper Canada he was appointed the first puisne justice of that Court, the Chief Justice of the Province, William Osgoode, being *ex-officio* chief of the Court.

To Powell was left the duty of framing the practice and getting the Court into operation, Osgoode having left the Province and become Chief Justice of Lower Canada.

Powell continued to be the senior puisne justice till 1815, when he was appointed Chief Justice.⁶ As Chief Justice he acted till 1825, when he resigned on a pension, dying in 1834.⁷

His many and valuable services as a Judge we need not go into here. Americans may, however, be interested to know that he was one of the representatives of the inhabitants of York (Toronto) when it capitulated to the American invaders in 1813. There are many episodes in his life of great interest. It will be sufficient here to mention a few.

His younger son Jeremiah was sent to New York to learn business; he went to Hayti and acted there as a trader. The negro Emperor Dessalines, angry at Jeremiah selling him as gold lace what was mere gilded stuff—"cuivre-doré"—made dire threats against him. Just at that time Miranda came along—a Venezuelan "Patriot"—who had got together a force in New York to free Venezuela from the Spanish yoke. The handsome young Canadian attracted the attention of Miranda, who held out to him the hope of lucrative trade in South America, etc., etc., and Powell thought it better to go with him than await Dessalines' coming. He received a commission as Major; but the vessel he was in was captured by the Spaniards. Some of the adventurers were

⁶It was not till 1829 that the practice arose of appointing native Canadians Chief Justices of the Province. The first four came from across the Atlantic. Powell was the fifth and the only American born, the sixth was also from Britain, then in 1829 came Sir John Beverley Robinson, the first Canadian born.

⁷Powell figures as defendant in two *causes celebres*, the one an action against him when Chief Justice of Upper Canada by Sir James Monk when Chief Justice in Lower Canada. Powell seems to have imagined because his creditor claimed too much from him he was justified in refusing to pay what was honestly due. The case which was fought to the Privy Council at Westminster is fully discussed in an article by the writer in *The Canadian Law Times* for July 1914; 34 Can. L. T. 589. In the other case, *Wood v. Powell*, he endeavored to procure the Lieutenant-Governor of the Province to act as a Chancellor but failed. The story in the case turns upon an old scandal in high society in Toronto; human nature is much the same in all places and at all times, and the whole story may well be left in deserved oblivion.

beheaded; and some, including young Powell, were sentenced to imprisonment at Omoa in Nicaragua, a notoriously unhealthy station, where prisoners were held and used like slaves. This was in 1806.

The father received information of his son's ill fortune, and went at once to the Spanish Ambassador in the United States. The Ambassador informed him that only the personal intervention of the King of Spain would be of any avail, and the heroic father without delay sailed for Europe. He has left an account of his adventures on this trip, which is full of most interesting and curious incident. He received the assistance of Royal Dukes and others and finally made his way to Madrid where he was most courteously received by the "Prince of the Peace"⁸ and obtained an order for his son's release.

The young man came home to Toronto shattered in health; a rest restored him partially and he tired of the monotony of a provincial town. Obtaining a position in Curaçao (then in British hands) he sailed for that island. Tiring of that place, he set sail for England and was never heard of again, vessel and crew either perishing in a storm or being captured by pirates or the enemy.

The Chief Justice's daughter Anne was equally unfortunate. She was a high spirited woman, and falling out with the somewhat stiff if stately society of the Provincial Capital, she made up her mind to go to her father, who was then in England. Sailing from New York in the spring of 1822 by the packet "Albion," she was drowned in the wreck of that vessel at the Head of Kinsale, on the south coast of Ireland, April 22nd, with nearly all the passengers and crew—only nine of the former and six of the latter being saved.

She had encouraged the unfortunates in their efforts to save the vessel, and is said to have been the original of the sailors' song, "Polly Powell." Her body was found and it received Christian burial in the Templetrine churchyard two miles from Garretstown Beach where it came ashore. A tombstone over the grave and a tablet in the church were placed to her memory by the father; and these still remain.⁹

Of the sons of the Chief Justice, the eldest, his namesake, was one of the ten who met at Wilson's Hotel at Newark (Niagara on-the-Lake) on July 17th, 1797 to organize the Law Society of Upper Canada, which has continued from that day and has been responsible for the legal profession in the Province for over a century. Another son, Grant Powell, was a well known medical man, and an army surgeon

⁸The "Prince of Peace" was Manuel de Godoy, Duke of Alcudia and Chief Minister of Carlos IV of Spain. He rose from an obscure position by means not too creditable, and on his marriage with the King's niece was created "Prince of the Peace" in honour of the pacification of Bâle 1795, effected in great measure by him (at least ostensibly).

His treatment of the unhappy father was courteous in the extreme; and it is almost certain that his influence had much to do with the speedy granting of Powell's petition.

⁹A more detailed account will be found in The Canada Law Times for May, 1914, "The Tragedy of Anne Powell": 34 Canada L. T. 410.

during the war of 1812-14. A third, John, was the Alderman Powell¹⁰ who brought warning to the loyal citizens of Toronto of the approach of the Rebels in the rebellion of 1837.

Many of the descendents of the Chief Justice are still to be found among the best people of Canada; and there is no likelihood that his name will ever be forgotten.

The Records.

The extant Records of this Court consist of two paper-covered folio volumes, and a third folio volume bound in parchment; the last in the vault at Osgoode Hall, Toronto, the first two in the Ontario Archives.

Those in the Archives were discovered by Dr. Fraser, the Provincial Archivist, in a search made by him through the Osgoode Hall vault; the other, being among the Term Books of the Court of King's Bench, escaped him; in going over these Term Books in 1913, I discovered it.

The Act of 1794, 34 George III, Cap. 2, by sec. 32 provided that all the Records of the various Courts of Common Pleas should be transmitted to and deposited in the Court of King's Bench and make a part of the records of that Court.

The volume found by myself has the original record of the proceedings of the Court of Hesse from its beginning, July 16th, 1789, till September 24th, 1789; then (reversing the volume) from May 19th, 1791, till August 4th, 1791, upon which day the Court adjourned to the 11th of August. Some thirty-six pages have been cut out before the record for May 19th, 1791, which probably contained the proceedings from September, 1789, till May 1791.

The first volume in the Ontario Archives contains the record from August 11th, 1791, till October 20th, 1791; the second from October 27th, 1791, till January 26th, 1792, and then from August 21st, 1792 till March 31st, 1794. The Court was on that day "adjourned till July Term," but on July 9th, 1794, the Court was abolished.

The records are well written and are perfectly legible.

I append Dr. Fraser's account of how he found the treasures now in his custody.

¹⁰John Powell, an Alderman of Toronto, went on a reconnoitre and was captured by the Rebels. He shot Captain Anderson, in whose charge he was, and galloped into the town. The Governor, Francis Bond Head, who was wrapped up in fancied security, was awakened to activity and defence by Powell; a force was collected and the rebel troops driven back and scattered. The victory was decisive, for although there were a few bands still left, and although a number of American "Sympathisers" invaded Upper Canada, the rebellion was hopeless.

Ontario Archives.

(Statement showing how the Records of the First Court of Common Pleas for the Districts of Hesse, Mecklenburg and Luneburg, Upper Canada, were found.)

DR. ALEXANDER FRASER,
Provincial Archivist.

"In the summer of 1910, Mr. C. M. Burton of Detroit, a most public spirited student of the history of the State of Michigan, and especially of the early days of Detroit, called on me in Toronto and expressed the desire to see the vaults at Osgoode Hall, the home of the High Courts of Ontario. Mr. Burton had asked me before this time to enquire at Osgoode Hall for the records of the Court of Common Pleas for the District of Hesse, or the Western District, which at one time included Detroit. The records have been sought for years in likely and unlikely places, including Osgoode Hall, but could not be found. I repeated the search, at his request, but the oldest of the officials, the custodian of the oldest vault for fifty-one years, knew nothing of them and stated that two systematic searches at the request of the Attorney General's Office had been made without avail.

"We were courteously received by Mr. M. B. Jackson, who repeated to Mr. Burton the result of the searches by himself and others. Mr. Burton's immediate object at the time, however, was to observe the method in use for filing the papers preserved in the vault and the several books used. We proceeded to the Old vault containing chiefly the files of judgments in Q. B. cases. At that time there was no electric light in the vaults and the use of a lamp was forbidden because of the possibility of accidental explosion. The languid flame of a tallow candle sufficed to show the way, though not to shed sufficient light on the dust-begrimed pigeon-holes. Mr. Burton noticed a book of ancient appearance on the top shelf that aroused his curiosity. To get it for him, I climbed on an uncovered deal box filled with old papers that lay on the floor, and reached the book. It proved to be a book into which letters of the eighties had been copied by letter press—of no apparent record value. I replaced the book, and in stepping down from the box upset it, and the contents emptied on the floor. Mr. Jackson asked me not to trouble to replace the loose material that had fallen out of the box, which could be attended to by the caretaker. I however thought it best to leave everything in the condition in which we had found it, and proceeding to pick up the contents of the box, the first article I got was a thin paper covered book similar to the old-fashioned books sometimes used by the township valuers of long ago. Indeed, I thought it was such a book and I proceeded to examine it. My astonishment may be imagined when I discovered that the book was one of the long lost Minute Books of the Common Pleas of the Western Districts, and there on the first page was the name of the "First Judge," the Honourable Wm. Dummer Powell. Mr. Burton and Mr. Jackson were standing near me in the narrow vault,

the latter holding the candle and telling our Detroit visitor of the age and glory of Osgoode Hall. I suppressed my rising feelings until all the papers had been put back in the box except eight thin folio sized books, one after another of which I had picked out of the orderless heap, shabby, tattered, and apparently useless note books but in reality of priceless value—being the original records of our oldest constituted Courts for the old Districts of Hesse, Mecklenburg and Luneburg in Upper Canada.

"I asked Mr. Burton to look at one of the books, remarking that he might feel interested in it. He opened it, looked at the page, stared at me, looked again, turned over some leaves, looked at me again. He tried to maintain the blasé air of a find-hunter, but when he saw the holograph of his relative, John Munro, on one of the pages he gave up the effort to appear calm and gave free expression to his exultation. In the circumstances he was to be excused for having known "all along" that the precious records were there. Did he not always hold that they must be at Toronto, in Osgoode Hall, and that very vault; and didn't he prove it by coming all the way from Detroit and going straight to the vault; did he not set me to overturn the dusty box in the corner, in the corner of which they had patiently hidden themselves, waiting for the hour of his arrival? Nor would anyone diminish his joy. It was my first great "find" in Osgoode Hall, and I promptly appropriated them. But the frail documents had a faithful guardian in Mr. Jackson, who upheld the authority of the stern Judges over every scrap of paper in the Building. But the Judges were not stern, and finding a legal difficulty in transferring these and other papers to the Ontario Government Archives, I prepared a Bill which passed the Legislature a year later, as Chap. 26, 10 Edward VII, and in due course the transfer took place."

My own find was rather prosaic. I was examining the proceedings of the Court of King's Bench, and had occasion to go over the Term Books. No. 10 of these volumes recorded the proceedings in Term of the Court of King's Bench from November 3rd, 1828, till July 1st, 1830, but this record was written only on the middle leaves of the volume, and at either side was the record of the Court of Common Pleas for Hesse. What had happened was plain: the Clerk of the Crown, finding a volume only in part written in, had economically utilized the remainder in his own Court.

Jurisdiction of the Court of Common Pleas.

This Court, as we have seen, was established by Lord Dorchester under the authority of his Commission, April 22nd, 1786, with the accompanying Instructions of August 23rd, 1786; the Quebec Act of 1774 having expressly provided by section 17 that nothing in the Act should prevent or hinder the King from establishing Courts of criminal, civil, and ecclesiastical jurisdiction by Letters Patent. As Blackstone puts it, Commentaries on the Laws of England Vol. III, p. 24, "all

Courts of Justice which are the medium by which he (i. e. the King) administers the laws are derived from the powers of the Crown."

The ordinance of 27 George III, c. 4, s. 9, April 30th, 1787 enacted that in view of "the thousands of Loyalists and others settled in the Upper Counties above Montreal and in the Bays of Gaspy and Chaleur" it should "be lawful for the Governor or Commander-in-Chief for the time being with the advice and consent of the Council to form by Patent under the Seal of the Province one or more new Districts"—the ordinance of the following year 1788, 28 George III, c. 7 in no way qualified this power—and the (Proclamation) Letters Patent of July 24th, 1788, followed creating five new Districts, among them that of Hesse.

The jurisdiction of a Court of Common Pleas was wholly Civil: criminal matters being dealt with by the Court of King's Bench, the Courts of Oyer and Terminer and General Gaol Delivery and the Quarter Sessions.

There was no limit, superior or inferior, to the amount to be sued for: claims for £10 sterling or under (£10 sterling was taken as the equivalent of £12 Quebec Currency, or vice versa—the difference is trivial) might be disposed of by one judge without a jury and without appeal (except in special cases): above £10 sterling two judges were required and an appeal lay to the Governor and Council (as in special cases of £10 and under) with a further appeal to the King where the amount in dispute was over £500 sterling (17 George III, c. 1 not repealed till 1794, 34 George III, c. 6, s. 38.) We have seen that the Ordinance of 1789 gave the "First Judge" in the Court of Common Pleas for the District of Hesse, such power as that he tried cases to any amount without a colleague—nor did he have an Assessor or Assistant: that was not required, as he understood the Canadian law and had practised it.

The Ordinance of April 21st, 1785, 25 George III, c. 2 by Section 9 provided "that all and every person having suits at law and Actions in any of the . . . Courts of Common Pleas, grounded on Debts, Promises, Contracts and Agreements of a Mercantile Nature, viz. between Merchant and Merchant, and Trader and Trader, so reputed and understood according to Law, and also of Personal Wrongs, proper to be compensated in Damages may at the option and choice of either party have and obtain the Trial and Verdict of a Jury as well for the Assessment of Damages on Personal Wrongs Committed as the Determination of Matters of Fact, in any such Cause." Nine jurors might render a legal verdict: in all cases between "Canadians or new Subjects," the jurors were to be Canadians: in cases between "Natural born Subjects" they were to be Natural born Subjects—in other cases half and half if so desired. The Ordinance of 29 George III, c. 3, provided that in the new Districts, Gaspé, Lunenburg, Mecklenburg, Nassau and Hesse, a juror should not be liable to challenge on the ground that he was not a freeholder if he had been the actual occupant

of one hundred acres of land under permission of the Government within the District for one year.

I cannot find any instance of a trial by jury in the Hesse Court either before or after 1792; but there are extant records of such trials in the Courts of Common Pleas for the Districts of Luneburg and Mecklenburg before the formation of the Province of Upper Canada and therefore before the Act of 32 George III, c. 2 (U. C.) which enjoined trial by jury.

In the Ordinance of 1789 there was also a provision made for Yearly Circuit Courts to be held in the Northern Parts of the District of Hesse upon Proclamation by the Governor—no such Proclamation was found necessary, so far as I can discover.

We have already seen that the Court of Hesse had jurisdiction over all cases instituted in it, wherever the cause of action or defence arose and whatever the domicile of the defendant. In Hesse also, by Sec. 10 of the ordinance of 1789, the Statutes of Limitation and Prescription were not allowed to be pleaded except where the cause of action should accrue after January 1st, 1790: in Hesse as well as the other three western Districts, proof in cases in which the title to the freehold should not be in question might be such as would satisfy either "the ancient or present Laws of the Province or . . . the Laws of England."

The Practice of the Court.

The Ordinance of April 21st, 1785, 25 George III, c. 2, made a distinction in the practice according as the claim was for more than £10 sterling or not.

Where the claim exceeded £10 sterling, the plaintiff drew up a "declaration" setting forth the grounds of complaint against the defendant: he presented this to a judge of the Court and prayed for an order to compel the defendant to appear—thereupon the judge granted an order which the plaintiff took to the Clerk of the Court and the Clerk issued a Writ of Summons, in His Majesty's name in the language of the defendant, tested in the name of the judge, directed to and executed by the Sheriff of the District, commanding the defendant to appear on the day appointed by the judge "in the order on the declaration, regard being had to the season of the year as well as to the distance of the defendant's abode or place of service from the place where the Court may sit."

An attachment against the body of a debtor might also be had if it was shown that the Debtor was about to leave the Province—a *Capias ad Respondendum*.

A copy of the Writ of Summons and of the declaration was served upon the defendant in person or left at his house with some grown person belonging to his family. If on the day appointed for the return, the defendant did not appear in person or by attorney, the plaintiff obtained "a default" against the defendant—the case then stood

over till the next weekly Court day and if the defendant failed to appear on that day without good reason for such neglect, the Court would hear sufficient proof of the plaintiff's demand and enter final judgment with such costs as to the Court should seem proper: execution would issue on this judgment for the amount of judgment and costs.

In cases not exceeding £10 sterling the practice was a little different. The plaintiff made out a declaration in the following form:

".....Day of.....17.... A. B. Plaintiff
C. D. Defendant

"The plaintiff demands of the Defendant the sum of.....
"due to the Plaintiff from the Defendant for..... which
"said sum though often demanded still remains due, therefore the
"Plaintiff prays judgment."

This declaration might be and often was prepared by the Clerk of the Court. The declaration was filed by the Clerk who made a copy of it and at the foot of the copy wrote out a summons in the language of the Defendant in a form given by the Ordinance. This commanded him to "pay the Plaintiff A. B. the above mentioned sum of..... together with.....costs, or else to appear in person or by your agent before our Judges of our Court of Common Pleas at the Court House of the City of on the day of otherwise judgment will be given against you by Default." This summons was then signed by one of the Judges and a copy of it and of the declaration served on the Defendant, either personally or left at his dwelling house or ordinary place of residence with some grown person there.

If on the day mentioned the defendant did not appear, the judges or one of them on proof of service heard the cause and gave judgment accordingly. If the defendant did appear but the plaintiff did not, or did not establish his cause, the action was dismissed with costs: but if both appeared, the case being tried out, judgment was given as the merits required—execution not issuing for eight days after judgment and then only against "moveables" i. e. personal property. The judge had the power of directing payment by instalments, but the time was not to exceed three months from the date of the execution.

In all cases as well below as above £10 sterling, if the defendant secreted or conveyed away his goods, or violently opposed their seizure, execution against the person, a *capias ad satisfaciendum*, might issue.

So, too, in actions between Merchants or Traders, or by Merchants or Traders for goods, etc., sold by them, a *ca. sa.* might issue if the execution against goods and lands did not produce enough to pay the debt; the plaintiff might, however, if the defendant swore he was not worth £10 be obliged to pay for the debtor's support in advance every Monday 3s. 6d. (70 cents). This allowance "in time of scarcity" the Judges might augment by any further sum not exceeding 1s. 6d. (30 cents) so that the creditor might find himself mulcted in a dollar a

week for the satisfaction of keeping his debtor in prison. If he failed to pay by as much as a cent, the debtor could claim his release unless the creditor could prove to the satisfaction of the Court that the debtor had secreted or conveyed away his effects to defraud his creditors.

Changes in Court Before Its Abolition in 1794.

The Court as instituted corresponded to the Courts of Common Pleas at Quebec and Montreal, but changes were made by the Legislature of the Province of Upper Canada.

In 1792 the very first Act of this Legislature (32 George III, c. 1, sec. 3) made the important change that "in all matters of controversy relative to property and civil rights resort should be had to the Laws of England, as the rule for the decision of the same"; and section 4 revoked *pro tanto* previous ordinances. The rules of evidence established in England were also prescribed (sec. 5).

Chapter 2 of the same Session provided that every issue of fact should be tried and determined by the unanimous verdict of twelve jurors, but that the jurors might bring in a special verdict.

Chapter 4 abolished the special procedure theretofore in vogue for the trial of actions of less importance. All actions involving more than 40 shillings Quebec currency (\$8.00) were to be commenced and proceeded with in the same manner as was directed for actions above £10 sterling, i. e. by writ of summons and declaration, etc. The Court then had no jurisdiction for causes under 40 shillings (Quebec Currency), and all actions above that sum were commenced and proceeded in, in the same way. For causes under 40 shillings (Quebec Currency) a new Court was by Chapter 6 created. This was the Court of Requests, held by Justices of the Peace. At the Quarter Sessions each District was divided by the Court into Divisions. At some fixed place in each division, on the first and third Saturday in every month, a Court sat called the Court of Requests, presided over by two or more Justices of the Peace. The Court had power to swear the parties as well as witnesses called by them, and was to decide with equity and good conscience. The practice was simple. One having a claim not exceeding 40 shillings (Quebec Currency) went to a Justice of the Peace and obtained a summons under the hand of the Justice, paying therefor sixpence (ten cents). This commanded the defendant to appear on a day fixed in the summons, and was served upon the defendant personally or left with a grown person at his dwelling house or place of abode, for which service one shilling (20 cents), and also four pence a mile after the first mile, was allowed. On the day appointed the matter was tried and judgment given; cost 2 shillings (40 cents). Witnesses were allowed an amount in the discretion of the Court not exceeding 2 shillings and 6 pence (50 cents) per diem.

The Courts of Common Pleas were abolished in 1794 by the Act 34 George III, c. 2, ss. 30, 31, and a Court of King's Bench for the

Province established (section 1) with unlimited jurisdiction, civil and criminal. Chapter 3 of the same Statute instituted a Court in each District for the trial of causes in all cases of contract above 40 shillings (\$8.00) and not exceeding £15 (\$60.00). This Court was called the District Court, and for the Western District sat at Detroit till 1796.

Costs.

Costs have for centuries always been an important factor in litigation. Costs were not known at the Common Law, although the fact that a plaintiff was put to cost might be taken into account in fixing the damages to be awarded him. But, beginning with the Statute of Gloucester in 1278, 6, Edw. I, c. 1, a number of statutes in England provided that the costs of a successful plaintiff, and, later, those of a successful defendant, should be paid by his unsuccessful antagonist.

A tariff of costs in the Courts of Common Pleas in Canada seems first to have been laid down by the Ordinance of March 9th, 1780, 20 George III, c. 3. That tariff provided both for the counsel (and attorney) and the clerk (both above £10 sterling, and above £30 currency) as well as for the crier, the bailiff and the sheriff.

The Ordinance of April 21st, 1787, 27 George III, c. 2, sec. 6 empowered the Judges in cases above £10 sterling, to award "such costs as they shall think reasonable" against a defaulting defendant; by section 8 "costs to the defendant against a non-appearing plaintiff." In cases below £10 sterling (section 36) the Judge must award costs to a successful plaintiff. I do not, however, find any new tariff prescribed; and the costs allowed in the Court of Common Pleas for Hesse District are distinctly higher than the tariff given.

The Money Systems.

The system mostly used was what was variously called Quebec, Halifax, or Provincial currency—pounds, shillings and pence. The value of this money was the same as later in Canada, £1 equals \$4.00: 1s equals 20 cents. New York currency was not unusual in this country, also composed of pounds, shillings and pence: £1 equals \$2.50: 1s. (the York shilling which was known even in my boyhood) equals 12½ cents (*ante* p. 77).

We find also the old French-Canadian currency, livres and sols (sous). In this currency one livre equals 20 sols (there is a clear mistake in the Ordinance of General Murray, September 14, 1764, from which it was made to appear that one livre equals 10 sols; that this is so can be seen from comparison of the ordinance March 29th, 1777, 17 George III, c. 9, and the Act of Upper Canada, 1796, 36 George III, c. 1.)

From the values given in the ordinances, a livre was substantially the same as the present franc and about 18½ cents. The computation is however, not always exact.

It is to be noted that the pound sterling was considered equal 10/9 of the currency pound, i. e. \$4 4/9. This is still considered "par" in exchange between England and Canada; the true relative value of the pound sterling is (about) 9½ per cent above this, so that when exchange is in fact at par it is said to be at 109½.

Criminal Courts.

The Court of King's Bench sat at Quebec and Montreal: but the Ordinance of March 4th, 1777, 17 George III, c. 5, s. 1, provided for the issue by the Governor of Commissions of Oyer and Terminer and Gaol Delivery. Outside of Quebec and Montreal, the serious criminal business was done in the Courts of these Commissioners of Oyer and Terminer and General Gaol Delivery. The same persons had both commissions, that of Oyer and Terminer, which enabled them to try all indictments found before themselves and that of General Gaol Delivery which enabled them to try all persons found in the prison which they were to deliver—the prisoners on bail could not be tried by them under this Commission, but he might appear before them as Commissioners of Oyer and Terminer and be indicted and tried. The Special Commission of Gaol Delivery, i. e. a Commission to try only some person named had long been discontinued.

After the creation in 1788 of the Districts, Commissions of Oyer and Terminer and General Gaol Delivery were issued from time to time in the Districts. Powell was always named on those for Hesse; others were associated with him in the Commission but took no real part in the trials.

These Courts tried all manner of treasons, felonies and misdemeanors: the Commission lapsed when the particular Court had been held and the Gaol was cleared.

There was in each District a list of Justices of the Peace whose Commission was for life and who sat each quarter of a year in the General Quarter Sessions of the Peace, at which at least two were required to be present, one of them being (by his Commission) "of the Quorum." "The jurisdiction of this Court by Statute 34 Edward III, c. 1 extends to the trying and determining all felonies and trespasses whatsoever, though they seldom if ever try any greater offence than small felonies within the benefit of clergy; their Commission providing that if any case of difficulty arises they shall not proceed to judgment, but in the presence of one of the Justices of the Court of King's Bench or Common Pleas or one of the Judges of Assize:" Blackstone's Commentaries, Bk. IV, p. 271. In fact, it was only minor offences, assaults and other trespasses, nuisances, petty thefts and the like which the Quarter Sessions undertook to deal with in these Districts.

By the same order July 24th, 1788, which appointed Baby, McKee and Robertson, Justices of the Court of Common Pleas, eight gentlemen were made of the Commission of the Peace: Alexander Grant, Guillaume La Motte, St. Martin Adhemar, William McComb, Joncaire

de Chabert, Alexander Maisonville, William Caldwell and Mathew Elliott—they thereby became entitled to the addition “Esquire.” William Robertson in his letter of complaint to Chief Justice William Smith (already mentioned) said of some of these that they “were altogether unqualified and incapable to discharge the Duties of a Commissioner of the Peace . . . their nomination was received even by themselves with surprise and by their fellow-citizens with evident signs of disapprobation . . . three of them are very illiterate and two of them it is publicly known in their district can neither read nor write unless a mechanical subscription of their name . . . may be explained to be writing.” On being examined before the Committee of the Council, he said that though Mr. Maisonville and Mathew Elliot could mechanically sign their names, they could neither read nor write, Captain Caldwell had not a good education, Captain La Motte was not a popular character, and Mr. Adhemar was settled at St. Vincent in the American States. He thought the former Commission of the Peace was sufficient, but if not, he recommended Mr. Asken, Mr. Leith, Mr. Shepperd, Mr. Sharpe, Mr. Park and Mr. Abbott.

The Committee make no reference to this in their Report: and it does not appear that any new Commission was made out.

Messrs. Thomas Smith and Montforton were recommended as Notaries, the latter having been acting as a Notary under the appointment of the Commandants at the Fort, since the death of Mr. Thomas Williams in 1785. The former, as we have seen, was appointed Clerk of the Court of Common Pleas.

Place of Sitting of the Court of Common Pleas.

It has usually been assumed that the Court of Common Pleas for the District of Hesse sat in Detroit. I think that this is an error.

In the first place the only Court records which are extant state the Court as sitting at L'Assomption, i. e. Sandwich, on the other side of the River.

Again, Anne Powell, sister of Mr. Justice Powell, in her description of the trip from Montreal (the MSS. still subsisting in Toronto) says, “The Fort lies about half way up the river which is 18 miles in length. In drawing the lines between the British and American possessions the Fort was left within their lines. A new town is now to be built on the other side of the river where the Courts are held and where my brother must of course reside.” The “new Town” to be built on the left bank of the river is mentioned more than once in documents a little later in date—and while it is certain Powell lived in Detroit, there is nothing to show that he held his Court elsewhere than in L'Assomption across the river.

In a letter by Lieutenant Col. England, Commandant at Detroit, dated Detroit, July 5th, 1792 he says, “there is not at present any civil court established here.”

Light is shed on the question by the legislation of the new Province of Upper Canada—the name District of Hesse was changed in 1792 by the Act 32 George III, c. 8 to the Western District, and Sec. 13 of that Act directed “that a Gaol and Court House for the Western District” should be built “as near to the present Court House as conveniently may be.” The Act 39 George III, c. 3 passed in 1794, by Sec. 2 provided that the new District Courts instituted by the Act should be holden “in the respective town, township or place wherein the Court House for the District is directed to be built excepting in the Western District where the said Court shall be holden in the town of Detroit.” This makes it quite clear that the Court House was not at Detroit.

The Courts of Oyer and Terminer sat also at L'Assomption at least, sometimes.

That the Courts of Quarter Sessions sat at Detroit from 1793 till it was given up in 1796 is certain—the Act 33, George III, c. 6 provides by Sec. 4 “that the Courts of General Quarter Sessions of the Peace for the Western District of the Province shall commence and be holden in the town of Detroit”—so also, as we have seen, did the new District Court.

This, too, came to an end—in 1796 the Act 36 George III, c. 4, directed the two courts, Quarter Sessions and District Court, thereafter to be holden in the Parish of Assumption (Sandwich) until such time as the Magistrates should think it expedient to remove and hold the same nearer to the “Isle of Bois Blanc.”

The Clerk of the Court.

Thomas Smith was of Welsh birth. A man of some education, he had been useful to the Royalist cause before Burgoyne's campaign; he drew plans of the fortifications on the Mohawk River for the purposes of the Royalists.

In 1776 we find him coming to Niagara with information concerning the revolting colonists: he then proceeded to Detroit. From July, 1776 till April 1777 he was Captain in the Indian Department but resigned, apparently on account of the uncertainty of advancement, “at that time without any regard to persons or merit.” Thereafter he served in the Militia at Detroit as second in command under Colonel McGregor until the peace of 1783. During this time he took part upon all occasions where active service was required. He says that in the hard winter of 1780 when no person could be found to go express from Detroit to Niagara in order to carry intelligence of the movements of the enemy, he volunteered and “performed that fatiguing journey upon snowshoes.”

He does not seem to have received a commission in the army after the reorganization of the Militia following the Peace of 1783, but he was employed for more than two years in locating the disbanded Rangers and other Loyalists at Detroit, who had been waiting for the lands which had been promised them on their enlistment. He acted as

Deputy Surveyor and paid out considerable money of his own to chain and axemen employed in the survey.

He received a commission as Justice of the Peace and was so well thought of that in 1788 he was recommended by the Detroit Merchants for a commission as Notary Public, an officer of much greater importance in the Civil law than at the Common law.

Smith was also in 1788 selected to go to Kentucky to induce immigration from that region into the Province.

Appointed Clerk of the Court of Common Pleas, July 24th, 1789, he kept the records (as far as they are extant) in excellent style, the handwriting and orthography (at least in English) being unexceptionable. In connection with his clerkship of the Court, he also was Clerk of the Peace and of the Sessions of the Peace.

He also became in 1789 the first Clerk of the Land Board of the District of Hesse with headquarters at Detroit, but this situation he lost the following year. The proceedings of the Board indicate that he was charged with selling Crown Lands and that he demanded an opportunity of justifying his conduct: the charge seems to have been without solid foundation.

He served as Clerk of the Court for three years and then retired and practised his profession as surveyor.

In July 1792 he went with Captain Matthew Elliott and Simon Girty accompanying a delegation of Indians to wait on the United States Commissioners then on an island in Detroit river to obtain a definite answer to the enquiry of the Indians whether the Commissioners were authorized to determine the boundary between the Americans and the Indians at the Ohio River.

He was placed in command of one of the Flank Companies of Militia in the Western District, and when General Wayne made his invasion of the Indian country, Smith was ordered out on active service and served from August, 1794 for four months on that service; he had his baggage taken by Wayne's armies.

In November, 1794 he was appointed Preventive Officer (Special) by Governor Simcoe of Upper Canada and served a year in that capacity. His position as a United Empire Loyalist was recognized by a grant in 1790 of 200 acres, Lot 30 concession 1 of the "Two Connected Townships", and in 1792 of Lot No. 12, First Township North side River La Tranche (Thames) and Lots Nos. 49 and 50 on the Petite Cote.

When Detroit was given up to the Americans in 1796, Smith made his election under Article II of Jay's Treaty of 1794 to remain a British subject, and continued to reside in Detroit. He was elected in the same year Member of the Legislative Assembly of the Province of Upper Canada for the County of Kent. His name appears in the list of 1,345 inhabitants of Detroit in 1806; later he removed from the American side and died at Sandwich in 1833. He was succeeded by

Charles Smyth who will be spoken of again in connection with the Bar practising in the Court.

William Montforton acted as Clerk for a short time during the illness of Charles Smyth (July 4th, 1792, he was sworn in; he acted, August 27th until the end of the year.)

He was of French descent and apparently a protégé of Rocheblave. We first hear of him at Michilimackinac, from which place he came to Detroit, about 1778. He took an active part in opening the eyes of the French people at the Illinois who were beginning to take the American Rebels by the hand, influenced in some degree by the assistance given by his old land France. His loyalty was attested in 1778 by Lieutenant Governor Hay.

In October of that year, he received a Commission as Captain of the Militia at Detroit and made that his only occupation for three years. He laboured among the Indians in the endeavour to secure their loyalty and with much success.

He was a man of sense and information far above the common standard in the Country at that time. He had considerable property also (including a female slave) as appears from the census rolls of Detroit for 1779 and 1782.

Having a wife and family, he found it hard to make ends meet; and we find him granted rations in 1784, and the same year made a notary public in the place of Thomas Williams who had been obliged to give up his Notaryship from press of private business. "Detroit" he says, "the most ungrateful Country on the earth, allowed him no resources except to sell his land and effects and send back to Canada a desolate wife to live with his parents where she could find some help." No doubt, the commission as Notary was intended in some degree to enable him to make a living.

He is spoken of in 1788 very highly and recommended for a permanent Notary Commission. The last trace of him that I can find is in 1793 when he makes a return as Captain of Militia of his Company.

The Sheriff.

Gregor McGregor (metamorphosed in some contemporary manuscripts to Grigor McGrigor) we find as early as 1777 in command of the Militia at Detroit with Thomas Smith under him; he seems to have been a merchant in that City. He continued to be Captain and adjutant of the Town Militia, and in March 1779 acted as one of the Commissioners for taking the census of Detroit and administering the oath to the inhabitants. He appears in the roll with his wife and one boy. He was then the owner of one male slave; and his pay as an officer of the Indian Department was "8 shillings York" (\$1.00) per day. This was not his only income or he would have been hard put to it to pay his dancing bills, which for one winter alone amounted to £17 19 11 (say \$72.00). The dancing assemblies were quite a feature in Detroit society but seem to have come high.

By 1782 Mr. McGregor's household had increased to two boys and two girls with three hired men and two male slaves. He had two hundred arpents of cleared land and considerable live stock.

His pay in the Indian Department was increased to "16s York" (\$2.00) by 1783 with rations as Captain of the Militia. The Provincial troops in the Upper Country were in 1784 ordered to be disbanded and McGregor lost his position in that force.

In 1788 he was superintendent of Inland Navigation and in that capacity made a Report to Dorchester.

July next, 1789, he was appointed Sheriff of the District of Hesse which position he continued to fill during the whole life of the Court of Common Pleas.

About this time he must have received the rank of Major, for we find him applying with that title to the Hesse Land Board for grants of land. April 22nd, 1791, lots 38 and 39 in the First Concession of the two connected Townships, four hundred acres in all were "given to Mr. McGregor, Major of Militia, as a mark of attention for his long services at this Post," (Detroit). He took the oath of Fidelity and Allegiance required and received his certificates. Not satisfied with these he asked for lot 43 in the Second Concession; his principle was that of the Hoosier farmer's wife: "Git plenty when you are agittin."

In this year he is found requiring as Major, the Captains of the Militia to make returns of their companies.

As his name does not appear in the list of those remaining in Detroit and continuing to be British Subjects on the surrender to the Americans of that Post in 1796, it seems probable that he crossed the river.

The Practitioners.

There was only one legally qualified Attorney who had been admitted as such, who practised in this Court.

But as in other Courts of Common Pleas, a layman, merchant or otherwise, might be appointed by special procuration by either party to act for him in an action. We have in our lowest Court in Ontario, the Division Court, retained the practice of allowing laymen to act as agents for litigants (even without special procuration) but this has not been allowed in the Superior Courts since the Act of 1794, 34 George III, c. 4.

The one practitioner was Walter Roe; he was the son of a resident of London, England, a man of some means. His father died and, his mother marrying again, Walter became dissatisfied with his home and went to sea. After following the sea for some years, he attracted the attention of his Captain by his intelligence and ability. When the ship reached Montreal, the Captain persuaded Roe to enter a law office. He did so, and was in 1789 admitted to practice law under the provisions of the Ordinance of 1785. He must have left Montreal at once for we find him in active practice in the District of Hesse that same summer. He appeared in the Court of Common Pleas in and for

the District of Hesse the very first day it sat, July 17, 1789, and, as has been said, he was the only professional man who practised in that Court during the five years of its existence (so far as appears by the extant records); he appeared on one side or the other in practically every case of importance and his name appears as witness to many of the conveyances of the period, no doubt drawn by himself.

Trained in the French-Canadian law and in the practice prescribed in the Quebec Ordinances he was at a disadvantage when, in 1792, the Legislature of Upper Canada introduced the English Law and in 1794 destroyed the Courts of Common Pleas and instituted the Court of King's Bench in their place. His name does not appear as Counsel in the Term Books, although several motions are made by other Counsel acting as his agent; once, too, his name occurs as witness. He was a considerable land holder in the Western District, his name appearing in many chains of title. It was he, it is said, who delivered to the Americans the keys of the Fort at Detroit on the surrender of that place the British in 1796 under the terms of Jay's Treaty of 1794. He became a Barrister at law and a member of the Law Society in 1797.

He was made a Registrar for the Western District of Upper Canada by Governor Simcoe in 1796, the Commission being still extant in the possession of his grandson, Albert E. Roe, Toronto.

It may be noted that it was a son of his, William Roe, who was the governmental clerk who saved the public money from the Americans on their capture of York (Toronto) in 1813 by burying it on the farm of John Beverley Robinson (afterwards Chief Justice of Upper Canada), east of the Don Bridge on the Kingston Road.

William Roe afterwards became a prominent merchant at Newmarket. The family tradition is that he was a juror on the trial of Lount and Matthews, March 26th, 1838, for their part in the McKenzie Rebellion. That would appear to be a mistake as these unfortunate men pleaded guilty. The trial referred to was probably that of Dr. James Hunter of Whitby, who was tried the same day that his two friends were executed, April 12th, 1838. On this jury was Mr. Gooderham—the original Gooderham, grandfather of the present generation. I have it from one who remembered those days, Sir Aemilius Irving, that when the jury retired to their room, Mr. Gooderham said, "Gentlemen, we have had enough hanging," and drawing his cloak about him added, "when you are agreed on a verdict of Not Guilty, call me. I am going to have a sleep." He then lay down. A verdict of Not Guilty was arrived at with no great delay.

One layman who appeared as Attorney in the Court was Charles Smyth, afterwards the Clerk of the Court; he seems to have been what we now call an unlicensed conveyancer, a class of professional men not yet quite extinct.

A contemporary letter by the Honourable Richard Cartwright, a member of the Legislative Council of Upper Canada says that Charles

Smyth the Clerk of the Court at Detroit was killed with some other British residents at Detroit in the campaign in 1794 of Gen. Anthony Wayne against the Indians. Wayne certainly threatened the Fort on the Miami built by Governor Simcoe and the Militia were called out at Niagara and Detroit in the expectation of war with the Americans—it was then that Smyth and others joined an Indian expedition and were killed by the American troops in an engagement. Doubt has been cast upon this statement of Cartwright's but I can see no reason why a Legislative Councillor of Cartwright's prominence and capacity should not know the facts, or knowing the facts, should not state them correctly.

It should be borne in mind that in those days and with those sturdy frontiersmen an expedition against or with Indians was looked upon as a picnic or holiday outing—and it was regarded much as we now regard a deer hunting trip in the woods—probably in most cases it was not more dangerous.

Another was Joseph St. Bernard, of whom I can find no account.

"Mr. McNiff" also acted as an Attorney by special procuration. This was Patrick McNiff, a surveyor. He had been in the eastern part of the Upper Country; we find him in 1785 employed as Deputy Surveyor in surveying the Townships near Cornwall and also near the "Ottaway or Grand River," this last for the accommodation of the officers and privates of the Engineer Corps who were to be provided with land. He had originally been appointed to assist Mr. Kotte, another surveyor, at 5s (\$1.00) a day, but when he became "Surveyor at New Johnstown" (Cornwall) this was increased by one-half when actively employed with an allowance of 3s (60 cents) when not employed.

The next year, 1786, we find him employed to "transact the whole business of the settlements from No. 1 to No. 8 townships below Cataraqui" (Kingston).

He remained in this region as Deputy Surveyor till 1789 when he was sent by John Collins, the Deputy Surveyor General, as Deputy for the District of Hesse—a letter of introduction by Collins is still extant. McNiff lost no time in applying to the Land Board for a lot at the entrance of the River Aux Canards, and being permitted to occupy 200 acres not immediately occupied by any other person. He made surveys in 1790 of lands on the east side of the River purchased from the Indians under instructions still extant. Complaints were made by some of the French-Canadians on the East side of the River of his surveys, but apparently without solid foundation. He found difficulties at L'Assomption (Sandwich) but these seem to have been overcome.

In July, 1791, he seems to have been relieved of his position by Order in Council, and sent a letter of expostulation to the Surveyor-General Collins and asked that if the order in Council was meant to "effect" him he might "take the most early opportunity by the opening of the ensuing spring to convey my infants from hence to some place

where they may not perish for want of the necessaries of Life." He says that when he was sent up to the Detroit Country, he could not "suppose or even entertain the least surmise that my long and past services should be so little regarded by the Government as first to order me with a numerous and helpless family into the heart of a wilderness near one thousand miles from the seat of Government and then cut me off from all support and leave my infants to suffer." This must have been effective, as we find him in 1793 engaged in surveys on the River Thames and giving estimates for repairs at Detroit.

As his name does not appear amongst those retaining their British allegiance on the evacuation of Detroit in 1796, it would appear that he became an American citizen. We find his name on the voter's roll at the election held January 14th and 15th, 1799 at Detroit, and he was subpoenaed as a witness on the trial by the Court of Common Pleas for Wayne County, October 23rd, 1800, of "a contested election of George McDougall, Esq."

He had in 1795 with others purchased land from the Ottawas which came in for some animadversions from Col. England, the Commandant at Detroit. In 1797 he with two others procured a deed of a considerable territory lying near Lake St. Clair from six Chippewa Chiefs—the witnesses to the deed certifying that it was "signed, sealed and delivered the same being first read and fully explained to the Chiefs who were perfectly sober." The consideration was Six thousand "dollars or bucks" paid at or before the delivery of the deed, but the grantees McNiff, James May and Jacob Harsen, agreed in addition, to deliver one hundred dollars or bucks in clothing or other necessities, yearly for ten years, provided the grant is confirmed by the United States, and also every year for thirty years, one-half bushel of Indian Corn for every farm of 200 acres improved on said tract of land and then every year for 960 years one quart of corn for every farm—the chiefs, their heirs and tribes to have the privilege of hunting, fishing, fowling, planting corn, building huts and making sugar on any part of the tract not enclosed.

John Askin is also found acting under special power of attorney.

He was born about 1741 at Strabane near Belfast, in Ireland, the descendant of an Erskine who had emigrated from Scotland and whose name was thus corrupted. He served in the British army at Ticonderoga and afterwards went into business in the then far Northwest as an Indian Trader. As early as 1773 he was Commissary at Michilimackinac and continued there till about 1780 when he had a falling out with Sinclair, the Commandant. He had business interests at Sault Ste. Marie also.

In 1775 he lost some £700 worth of property, furs, which were ordered by Colonel Caldwell, the Commandant at Niagara to be thrown overboard in Lake Erie for fear they should be captured by the Americans; and some of his property in Montreal—14 puncheons of rum—

was carried off by the American invaders when they abandoned that City.

His sloop "Caldwell" is mentioned more than once.

As early as 1776 he was also Barrack Master at Michilimackinac as well as Commissary of Provisions. In 1779 he was selected by the Detroit Merchants as one of the Managers of the Joint General Store they established at Michilimackinac. On his dispute with Sinclair he gave a bond for £4000 to settle his accounts with the Government and removed to Detroit. The charge of disloyalty made by Sinclair was almost certainly baseless, and Sinclair afterwards regretted making it.

He took the long and expensive journey to Quebec to settle his account (1781), and returned to Detroit where he entered into business as a merchant. He appears on the roll in 1782 as a slaveowner and man of means. In 1756 he bought some of the property of the Moravian Brethren on the Clinton River when they gave up their mission at that place.

A man of liberal education, he was on at least one occasion nominated as a Commissioner of Oyer and Terminer, and was a Justice of the Peace. From and after 1790, he was a Member of the Land Board of the District of Hesse. He was a considerable landowner on the Canadian side as well as on the other.

In 1796 on the surrender of Detroit, he remained a British subject and procured the signatures of others choosing to retain their allegiance, but he did not actually remove across the river till 1802. He had property interests opposite Bois Blanc, and built a residence which he called Strabane after his native place in Ireland. This was not far from Walkerville. In the correspondence of the year 1812, etc., it is variously called "Strabane, Detroit", "Strabane, Amherstburg," and "Strabane, Sandwich."

He was too old to take part in the war of 1812, but he had four sons, ten grandsons and three sons-in-law actively engaged on the British side. He survived till 1818 leaving many descendants on both sides of the river.

The First Case.

The first case introduces us to the romance of the place.

George McDougall, a lieutenant in the Royal American Regiment, in 1767 petitioned the Crown to be granted Hog Island, an island then about three miles above Detroit. This island had been known as Wah-nah-be-see (The Swan), Isle au St. Clair, L'Isle au Cochon, but after the conquest by Britain had settled down to the plebeian name of Hog Island. It had been for a long time used by many of the inhabitants of Detroit as a pasturing ground; and had been petitioned for at least twice before, once by Lieutenant Mant (who even got a deed for it, which, however, was worthless) and once by Lieutenant Abbott

of the Royal Artillery. The King in Council at St. James made an order, May 4th, 1786, to General Gage, Commander in Chief of the forces in North America, to "put Lieutenant George McDougall, late of the 60th Regiment, in possession" of the island "provided that can be done without umbrage to the Indians." Gage sent instructions August 29th, 1768, to Captain Turnbull (of the 60th Regiment) that "as Mr. McDougall's occupying these lands depends on the sufferage of the Indians who have claims thereto, it will be necessary that those Indians publicly signify to you or rather give a written acknowledgment of their consenting to the Cession of these lands in favour of Mr. McDougall." The island lay within the territory reserved by the Royal proclamation of October 7th, 1763, as hunting grounds for the Indians, and therefore their consent was sought.

Accordingly, Oketchewanong, Couttawgin and Ottowachkin, Chiefs of the Ottawas and Chippewas, for themselves, "and with the consent of the said nations of Indians" appeared before Captain Turnbull, Lieutenant McAlpin and Ensign Amiel, of the 60th Regiment, and signed a formal conveyance to McDougall of the island in consideration of goods valued at "£194" 10 "current money of the province of New York" (\$486.25); the goods being five barrels of rum, three rolls of tobacco, three pounds of vermilion and a belt of wampum, down, and three barrels of rum and three pounds of paint when possession should be taken. One of the commanders at Michilimackinac truly said of the Indians, "Rum is their God." The totems of the Indian Chiefs are attached in lieu of seals.

Captain Turnbull posted up a public notice of the sale, May 4th, 1769, and McDougall also posted notices forbidding the public from bringing any cattle on the island. Thereupon, many of the (French) inhabitants of Detroit and vicinity petitioned the Governor, Sir Guy Carleton, alleging that the first Commandant of the Country, M. de la Motte, had ceded the island to the public as a common to keep the cattle in safety; that it had been used as such; that when M. de Troutz was Commandant he had taken possession of it, but a request of the public forced him immediately to abandon it; that M. de Quindre had also obtained it under the order of M. de Celeron, but had also to give it up. The petitioners asked that it might "remain in common as it has been since the establishment of this colony."

This Petition being sent on to General Gage, Major Bruce, "Commanding Officer of Detroit and its dependencies" was ordered to make an investigation.

It was proved that McDougall had taken possession in 1762-3 and had built a house and established his family there without complaint, also that the Canadians never put their cattle on the island or cut hay there without the permission of the Commandant, and not at all as of right. The report was adverse to the petition, and McDougall was confirmed in his ownership.

He remained owner of the island till his death in 1779 or 1780. It

was taken for Crown purposes for a time, but returned after the peace of 1783 on the petition of Lieutenant George McDougall, his son.

The elder McDougall left two infant sons, George and John Robert. Haldimand in 1780 intended to reclaim it for the Crown and garrison at Detroit, but he did not. George McDougall, by a letter of July 25th, 1785, promised to give his brother his undivided half of the island, but as John Robert was then in difficulties, George did not at once make a deed; this he did January 6th, 1794.

The island is now Belle Isle, the City Park of Detroit (having, it is said, been named Belle Isle after a daughter of General Lewis Cass) and the title is derived through William Macomb, to whom John Robert McDougall granted it by two deeds, November 11th, 1793, and April 7th, 1794. These were drawn and witnessed by Walter Roe, McDougall's attorney in the first action in this Court.

It may be added that George McDougall, Sr., had been captured by the Indians at the time of Pontiac's siege of Detroit, but made his escape.

The plaintiff in the first case in this Court was this John Robert McDougall.

The defendant was a sergeant in the 65th regiment, which we find by a Report of the State of the Troops in the Upper Parts, 1st November, 1787, to have been at that date at Niagara and neighbouring places. The regiment must have replaced the 53rd at Detroit early in the spring of 1788.

The course taken in this case is typical. The amount claimed is over £10. The plaintiff, by his attorney, Walter Roe, made out a declaration and obtained an order for a writ of summons from the Judge. The Clerk, Thomas Smith, issued a writ of summons ordering the defendant to appear on July 16th, 1789. A copy of the writ and a declaration was served upon the defendant, and proper affidavit of service made by the sheriff, Gregor McGregor, or his bailiff. Upon the day appointed, the plaintiff appeared in Court by his attorney, and filed the writ and declaration with proof of service. The defendant was then called the traditional three times, but did not answer. The Judge thereupon directed a "Default" to be entered against the defendant. This did not preclude the defendant; he might appear on the next Weekly Court day. Accordingly, we find the case called upon July 23rd. He did not appear then, and strictly the Court might have proceeded on that day to hear evidence and determine the case. We find, however, that this was not done, but that a second default was recorded against the defendant, and the plaintiff was directed to prove his demand on August 20th. On that day the defendant did not appear, and Mr. Roe called witnesses, one to prove that the defendant had put sixty head of cattle on Hog Island in June, 1788, and taken off forty in December; that he had desired the witness to take care of the cattle and he would pay him well. This witness was Francois Chartre, who was "not interested in the cause," and who seems to have

been care taker and manager for McDougall, the plaintiff. Another witness, James May, was a tenant in Hog Island, and received twenty shillings per head for cattle put on the island for the season, whether they remained or not. The case then stood for over "eight days"—i. e., a week; and on the 27th of August, judgment was entered for £30 9 6d and £9 9 5d costs, in all, £39 18 11d. A writ of *feri facias* was issued, which cost another five shillings. This was not effective, and on October 2nd, 1789, an *alias fi fa* was issued for the former amount and £1 15s subsequent costs, in all £41 18 11d.

It is worthy of observation that neither of the parties gave evidence. It was not till 1869 that a party to an action was in this Province allowed to give evidence in support of his claim. Any party might be called as a witness by the opposite party, after November 10th, 1852, when the Act 16, Vic. (Can.) c. 19 was passed; but it required another statute, 33 Vic. (Ont.) c. 13, coming into force December 24th, 1869, to enable him to give evidence on his own behalf.

